UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2775

September Term, 2014

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DESMOND RASHAD ROBERTS, SR.

v.

STATE OF MARYLAND

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Krauser, C.J.,
Berger,
Reed,

JJ.

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Opinion by Berger, J.

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Filed: February 2, 2016

Appellant, Desmond Rashad Roberts, Sr. ("Roberts"), entered a conditional guilty plea, pursuant to Md. Rule 4-242(d), to possession of cocaine and possession with intent to distribute cocaine. After merging the possession count with the possession with intent to distribute count for sentencing purposes, the court sentenced Roberts to a term of fourteen years' imprisonment, with all but nine years suspended, followed by three years of probation. Prior to pleading guilty, Roberts filed a motion to suppress evidence which the trial court denied.

On appeal, Roberts poses a single question:

> Whether the trial court erred by failing to grant Roberts's motion to suppress.

Perceiving no error, we affirm.

## FACTUAL BACKGROUND

Roberts operated two adjacent businesses out of a single suite in a strip mall in Salisbury. Those businesses were "King's Touch Barbershop" and "King's Candy and More."

On August 28, 2014, Officer Jonathan L. Oliver of the Salisbury City Police Department applied for a search and seizure warrant for those businesses. In the affidavit section, under the heading "Facts in Support of Issuance of Search and Seizure Warrant," the application stated:

> During the month of July 2014, members of the Wicomico County Narcotics Task Force received information about a subject identified as Desmond Rashad Roberts (D.O.B. ****) who is selling ounces of cocaine from the business of King's Barbershop. **The source who provided this information stated that Roberts was cutting kilograms of cocaine and**

**packaging them within the barbershop and selling them from within**.

During the month of August 2014, members of the Wicomico County Task Force received information from a subject who advised that Desmond Rashad Roberts, known by the source, as well as investigators, to go by the name of "Duck" **was selling large amounts of cocaine from within King's Barbershop**, located at 1122 Parsons Road, Suite "E," within the "Wali Plaza," Salisbury, Wicomico County, Maryland. The source stated that within the month of August, **the source knew of Roberts to be in possession of a kilogram amount of cocaine**.

On August 27, 2014, Stpr. Moore conducted **several hours of surveillance** of the vicinity of 1122 Parsons Road, Suite "E," Salisbury, Wicomico County, Maryland. During that period of time, Stpr. Moore observed numerous subjects in the area of King's Barbershop. **Stpr. Moore also observed a large amount of foot traffic which entered the barbershop and left within one or two minutes of entering the suite**.

On August 28, 2014, at approximately 2100 hours, Sgt. Welch and Stpr. Moore of the Maryland State Police were on foot in the vicinity of 1122 Parsons Road, Suite "E," Salisbury, Wicomico County, Maryland, when they **observed several subjects standing outside the business** of King's Candy and More. **Once the subjects observed Sgt. Welch and Stpr. Moore, the investigators heard subjects say, "That's the police" and numerous subjects fled different directions to include inside the business**.

Sgt. Welch and Stpr. Moore immediately **detected the strong odor of burnt marijuana** in the immediate area. **This odor appeared to be emanating 1122 Parsons Road, Suite "E,"** Salisbury, Wicomico County, Maryland. As officers reached the entry of the business and entered the business, the odor of burnt marijuana grew continually stronger. For safety reasons, Sgt. Welch and Stpr. Moore detained two subjects inside King's Candy and More and one subject at the entrance of the suite. The subject detained at the entrance of the suite was in fact identified as Desmond Rashad Roberts, the subject in which several tips were received about. **While inside King's**

**Candy and More, Sgt. Welch observed in plain view a clear plastic baggie of what he was able to identify through his training, knowledge and experience as suspected marijuana**.

Based upon the information contained herein, it is the belief of your Affiant that probable cause does exist to believe that certain property, namely: Controlled Dangerous Substances, Controlled Dangerous Substance Paraphernalia, Records and Monies from Controlled Dangerous Substance transactions, Electronic Recording Equipment, Electronically Recorded Tapes, Computers, documents, paperwork and additional evidence related to Controlled Dangerous Substance offenses and the identification of individuals participating in and/or committing Controlled Dangerous Substance offenses . . . . [o]n the following premises:

- 1122 Parsons Road, Suite "E," Salisbury, Wicomico County, Maryland. This property houses businesses known "King's Candy and More" and "King's Touch Barbershop." This property is further described as a brick building located within the "Wali Plaza." 1122 Parsons Road, Suite "E," is located inside the 4th door in the building when coming from the intersection of Pemberton Drive and Parsons Road. The number "1122" and the letter "E" are located directly above the door entrance to King's Candy and More in black horizontal letters. 1122 Parsons Road, Suite "E," is clearly marked with "King's Candy and More and King's Barbershop" on the front window of the Suite.

This belief is based upon:

- The confidential source's information about subjects selling C.D.S. from the building.

- The odor of burnt marijuana emanating from the building of 1122 Parsons Road Suite "E."

- The observation of suspected marijuana in plain view within 1122 Parsons Road, Suite "E."

- The investigation of your Affiant Oliver.

- The training, knowledge and experience of Sgt. Welch and Stpr. Moore.
- The training, knowledge and experience of your Affiant Oliver.

(Emphasis added).

On August 28, 2014, police officers executed a search warrant on both businesses and recovered, among other things, "a large bag containing a large amount of suspected marijuana as well as a large amount of suspected cocaine in multiple baggies." Roberts was charged with possession with intent to distribute and related charges for both substances. Prior to trial, he moved to suppress the controlled dangerous substances that had been recovered.

The court held a hearing on the motion to suppress evidence. Roberts was the only witness to testify during the hearing. He explained that his two businesses share one exterior door. Inside the door is a vestibule area with two doors -- the door to the right leads to the barber shop and the door to the left leads to the candy store. Roberts explained that patrons would come and go from the candy store to buy candy, cigarettes, sodas, potato chips, "and every other kind of thing I sell." The candy store had a long counter and, according to Roberts, in order for the police to have seen the bag of marijuana in plain view, as they contended, the officers would have had to have been behind the counter.

Roberts testified that he did not smell marijuana when the police officers arrived. Rather, Roberts testified that the officers walked up to him and "said 'we smell weed' and pushed me out of the way and proceeded to go into the store." The suppression court

denied the motion to suppress. Roberts thereafter entered a guilty plea to possession of cocaine and possession with intent distribute cocaine.

**DISCUSSION**

Roberts's first contention is that the warrant so lacked probable cause that it was deficient on its face, rendering the "good faith" exception inapplicable. Roberts argues that the warrant lacked probable cause because: (a) the police officer who prepared the affidavit (Officer Oliver) did not personally witness the events described in the affidavit but was instead told the information by other police officers; (b) there was no indication that the officers who conducted the investigation and supplied information to officer Oliver for the warrant application had been trained to identify marijuana or the odor of marijuana; and (c) there was no information about the reliability of the informant(s).

Second, Roberts contends that that the affidavit supporting the warrant application contained material misrepresentations of fact.[1] Roberts argues that, while the affidavit stated that there was a "large amount of foot traffic which entered the barbershop and left within one or two minutes," the affidavit did not mention that a "candy store, which sells

[1] During the suppression hearing, appellant argued that he was entitled to an evidentiary hearing, pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), because he had made a "substantial preliminary showing" that warrant affidavit contained a knowing and false statement on a material matter. Appellant makes no mention of that request for a hearing on appeal. Instead, the only mention of any remedy for the perceived error of the court states "Reversal is required". In any event, we believe that the appellant was afforded the functional equivalent of whatever hearing he sought below. During the suppression hearing, evidence was taken that went outside the "four corners" of the warrant when appellant testified. Moreover, no one limited the scope of the evidence to be taken at the hearing other than Roberts's counsel, who said near the conclusion of the hearing "I think it is my hearing and I get to make the issue . . . And I think if I wanted to call some of the police officers I could, but I don't think I need to, Your Honor."

sodas, cigarettes and snack foods, was also located in the same suite." Moreover, Roberts contends that the marijuana found in the store by the police was not in plain view as stated in the affidavit, but rather was located behind the counter and under the cash register. Finally, Roberts contends that the affidavit contained no information that the police did *not* recover any evidence of burnt marijuana in the store after having smelled it.

The Fourth Amendment, made applicable to the States through the Fourteenth Amendment, guarantees the right of the people against only unreasonable searches and seizures. *See Williamson v. State*, 398 Md. 489, 501-02 (2007) (citing *United States v. Sharpe*, 470 U.S. 675, 682 (1985)). The requirement that police obtain a warrant, and support the application for that warrant with probable cause, is a means of ensuring that reasonableness. "When the State seeks to introduce evidence obtained pursuant to a warrant, 'there is a presumption that the warrant is valid[,]' and 'the burden of proof is allocated to the defendant to rebut that presumption by proving otherwise.'" *Volkomer v. State*, 168 Md. App. 470, 486 (2006) (quoting *Fitzgerald v. State*, 153 Md. App. 601, 625 (2003)).

When reviewing a court's decision to issue a warrant, we apply a deferential standard. In *Greenstreet v. State*, 392 Md. 652, 667-68 (2006), the Court of Appeals explained:

> We determine first whether the issuing judge had a substantial basis to conclude that the warrant was supported by probable cause. *State v. Amerman*, 84 Md. App. 461, 463–64, 581 A.2d 19, 20 (1990). We do so not by applying a *de novo* standard of review, but rather a deferential one. The task of the issuing judge is to reach a practical and common-sense decision, given all of the circumstances set forth in the

> affidavit, as to whether there exists a fair probability that contraband or evidence of a crime will be found in a particular search. *Illinois v. Gates*, 462 U.S. 213, 238–39, 103 S. Ct. 2317, 2332, 76 L. Ed.2d 527, 548 (1983). The duty of a reviewing court is to ensure that the issuing judge had a "substantial basis for . . . conclud[ing] that probable cause existed." *Id*. (Quotation and citations omitted); *Birchead v. State*, 317 Md. 691, 701, 566 A.2d 488, 492–93 (1989); *Potts v. State*, 300 Md. 567, 572, 479 A.2d 1335, 1338 (1984) (Quotation and citation omitted). The U.S. Supreme Court explained in *Gates* that the purpose of this standard of review is to encourage the police to submit to the warrant process. *Gates,* 462 U.S. at 237 n. 10, 103 S. Ct. at 2331 n. 10, 76 L. Ed.2d at 547 n. 10.

We see no merit to Roberts's contention that the warrant was defective because the application was not made on the basis of the personal observations of the officer who wrote it but instead was based on hearsay from other officers. In *Pearson v. State*, 126 Md. App. 530, 543-44 (1999), after pointing out that "a constitutionally adequate search warrant may be based on hearsay, so long as the issuing judge or magistrate is confident that probable cause for the search exists on the face of the affidavit under the totality of the circumstances," we explained that "the reliability in an affidavit of hearsay information that was obtained from other members of an investigating police team who were named in the affidavit was 'too plain to require discussion.'" *Id*. at 544 (quoting *Grimm v. State*, 6 Md. App. 321, 328 (1969)).

We are further unpersuaded by Roberts's contention that the application was deficient because it contained no indication that the officers who conducted the investigation and supplied information to Officer Oliver for the warrant application had been trained to identify the odor of marijuana. Indeed, we have emphasized that "[n]o

specialized knowledge or experience is required in order to be familiar with the smell of marijuana." *In re Ondrel M.*, 173 Md. App. 223, 243 (2007).

We need not entertain Roberts's remaining contentions because even if all of the information about them were removed from the warrant application, the application still contained adequate probable cause. In the application, it was reported that police officers saw a group of people in front of Roberts's business, and "[o]nce the subjects observed [the police], the investigators heard subjects say, 'That's the police' and numerous subjects fled different [sic] directions to include inside the business." Moreover, the police smelled burnt marijuana "emanating [from Roberts's business]" which "grew continually stronger" as the officers approached and entered the business.

The smell of burnt marijuana alone establishes probable cause. *Ford v. State*, 37 Md. App. 373, 380 (1977). In *State v. Harding*, 166 Md. App. 230 (2005), we explained:

> Any question as to whether the odor of marijuana alone can provide a police officer probable cause to search a vehicle was dispelled by the Supreme Court in *United States v. Johns*, 469 U.S. 478, 482, 105 S. Ct. 881, 83 L. Ed.2d 890 (1985), where Justice O'Connor wrote for the Court: "After the officers came closer and detected the distinct odor of marijuana, they had probable cause to believe that the vehicles contained contraband." To similar effect, see *Ford v. State*, 37 Md. App. 373, 379, 377 A.2d 577 ("knowledge gained from the sense of smell alone may be of such character as to give rise to probable cause for a belief that a crime is being committed in the presence of the officer"), *cert. denied*, 281 Md. 737 (1977).

*Id* at 240.

In sum, assuming without deciding the correctness of Roberts's contentions that the informants were not shown to be sufficiently reliable and that the police misled the warrant

issuing judge, and after excising all information about the informants, the foot traffic, and the bag of marijuana found inside the store from the application, there remained a "substantial basis for . . . conclud[ing] that probable cause existed," *Greenstreet*, 392 Md. at 668, based upon the odor of burnt marijuana emanating from Roberts's business.

Furthermore, assuming *arguendo* that the warrant was invalid, we hold in the alternative that the good faith exception applies. When an officer "acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope," the exclusionary rule does not apply. *United States v. Leon*, 468 U.S. 897, 919 (1984). *See also Marshall v. State*, 415 Md. 399, 408 (2010) ("Under the good faith exception to the Fourth Amendment's exclusionary rule, evidence obtained pursuant to a search warrant, later determined or assumed to have been issued improperly, should not be suppressed unless the officers [submitting the warrant application] were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause.") (bracketed text in original) (internal quotation and citation omitted).

The United States Supreme Court has identified four circumstances when the exclusionary rule applies even when an officer conducts a search based upon an apparently valid warrant: (1) when the judicial officer issuing the warrant was misled by an affidavit that "the affiant knew was false or would have known was false except for his reckless disregard of the truth"; (2) when the judicial offer "wholly abandoned his judicial role"; (3) when a warrants is "so lacking in indicia of probable cause as to render official belief

in its existence entirely unreasonable"; or (4) when the warrant is facially deficient, such as by failing to particularize the place to be searched. *Leon*, *supra*, 468 U.S. at 897.

In this case, Roberts asserts that the third category applies because the affidavit was "bare bones."[2] We disagree. In the affidavit supporting the warrant application, Officer Oliver averred that two police officers smelled marijuana emanating from Roberts's place of business. Officer Oliver further averred that, when the officers entered the business, one saw a bag of marijuana in plain view. Belief in the validity of a warrant based upon these facts is not unreasonable. Accordingly, even if the warrant were invalid, the exclusionary rule does not apply.

We are further unpersuaded by Roberts's contention that the circuit court erred by denying his request for a *Franks* hearing. A defendant is entitled to a *Franks* hearing if he first makes "a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit." *Fitzgerald v. State*, 153 Md. App. 601, 638 (2003), *aff'd on other grounds*, 384 Md. 484 (2004) (*quoting Franks*, *supra*, 438 U.S. at 155-56). Roberts argued before the trial court that there were multiple misrepresentations in the affidavit. Roberts argued that the "large amount of foot traffic" described by Officer Oliver could have been people patronizing the candy store rather than the barbershop, that the bag of marijuana

[2] In support of this argument, Roberts cites two cases in which the Court of Appeals considered the application of the good faith exception: *Agurs v. State*, 415 Md. 62 (2010) and *Marshall v. State*, 415 Md. 399 (2010). Roberts does not explain, however, how the facts of the cited cases support his assertion that the good faith exception should not apply in this case.

could not have been seen from the front of the counter, and that no evidence of burning marijuana was actually recovered from the store.

With respect to the "foot traffic" issue, Officer Oliver expressly stated that the people Sergeant Moore observed were entering the barbershop, not the candy store. This is not an intentional or knowing misstatement. With respect to the bag of marijuana which Roberts claimed was not in plain view, Sergeant Welch and Trooper Moore could have easily looked behind the counter while inside the candy store. Roberts's testimony that the marijuana was not visible from the front side of the counter does not indicate that Officer Oliver made a knowing and intentional misstatement in the affidavit. Finally, the fact that no burnt marijuana was actually recovered from the store does not suggest that Officer Oliver made a knowing and intentional misstatement when he stated that the odor of burning marijuana was emanating from the store. The odor of burnt marijuana may have been from some period of time earlier. Furthermore, several people fled the store after being alerted to the presence of police, one or more of whom could have taken evidence of the burning marijuana with him or her. In sum, Roberts failed to demonstrate a substantial preliminary showing that Officer Oliver made any intentional, materially false statements in his application for a search warrant. As such, the circuit court properly denied Roberts's request for a *Franks* hearing. Accordingly, we affirm.

**JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.**